ARGUMENT

I.—Joint Trials

The petitioners insist that they were denied due process of law because of their being tried jointly with other defendants in the criminal proceeding upon two theories: (1) one of the defendants testified for the State even though counsel for these petitioners were assured that no agreement or "deals" had been worked out between the prosecuting counsel and any of the defendants in the cause and counsel for one of the co-defendants objected to a court ruling favorable to petitioner Ragland when no objection was made by the prosecuting counsel, and (2) the confessions of two of the co-defendants were allowed in evidence to the prejudice of these petitioners.

As revealed by the evidence, one of the defendants, Dean Smith, entered into the burglary from which petitioners' conviction arises at the suggestion of petitioner Wright. He was a young policeman and Wright was an older man who had been on the police force for approximately six years and was Smith's superior. At the trial Dean Smith was called as a witness after the other State's proof was heard, and he testified in detail regarding the planning of the burglary, the execution of it, and the disposal of a number of television sets, the fruits of the burglary. During the trial up to this point, it appears from the brief and the record petitioners feared something like this would happen. They made known their apprehension to the court. Prosecuting counsel assured them that no agreement had been made with defendant Smith relative to any disposition of the charges against him.

In the petition it is insisted that testimony of Dean Smith was most surprising to them and that they should have been informed that Dean Smith would testify against them in order for them to properly prepare for trial. They

cite in support of their position **Giles v. Maryland**, 386 U.S. 66-98, to the effect that it is the responsibility of the State to see that they got a fair trial; and **Roviaro v. U. S.**, 353 U.S. 53, to the effect that the accused in a criminal case was entitled to the name of an informer who might present favorable evidence for an accused.

Of course, in this case the petitioners knew of Smith's involvment in the case; at least they knew he was a defendant in the case since he had been indicted with them, and the State insists that because of this circumstance, they knew or should have known Smith or any one of the other co-defendants might testify against them during the trial. It is not unusual for one of a group of defendants to testify favorably for the State. Certainly, it is not unusual for the prosecution to call one of the defendants to testify as a State's witness, and from the testimony the petitioners should have suspected that Smith was a likely witness for the State to call. Further, if any kind of agreement did exist between Smith and the State, there is no indication from the results of the trial that it was favorable to Smith for he was convicted of an offense growing out of the circumstances and sentenced to serve three (3) years, the minimum imposed upon the petitioners.

As evidence of this complaint, it is pointed out in one of the questions presented that counsel for Smith objected to a court ruling favorable to Ragland, but it is also pointed out in the petition that this took place outside the presence of the jury, and it seems to be conceded that the petitioners were not prejudiced by the objection. He merely states that it shows the attitude of Smith and his counsel.

Confessions of two of the co-defendants were admitted into evidence in the criminal proceeding that resulted in the petitioners' conviction. They insist this was in violation of the holding in **Bruton v. U.S.**, 391 U.S. 123.

The State insists that this case is distinguishable from the Bruton case because the co-defendants who made the confessions in this cause testified as witnesses in the criminal proceeding and thereby subjected themselves to cross-examination by counsel representing the petitioners.

II.—Evidence of Another Offense

The question regarding the admission of evidence of previous offenses by petitioner Wright seems to have been abandoned. No argument is made in support of it nor is any authority cited with respect to this question; and the opinion of the Court of Criminal Appeals (Appendix B) does not indicate the question was decided by the State Court of Criminal Appeals. The State, therefore, insists that it is unnecessary to make a further discussion of this question.

III.—Illegal Search

The circumstance or the conduct of the defendants from which this conviction arose occurred in January 1967, approximately two years before the holding in the case of **Chimel v. California,** 395 U.S. 752, and the State insists that the testimony of the officers who made the search of petitioner Wright's home and automobile were of the opinion that they had a right, after having made a lawful arrest of petitioner Wright, to search his premises. Petitioner Wright had been a policeman for six years on the same force as the officers who arrested him. He, no doubt, was of the same opinion. The officers who made the arrest testified that petitioner Wright consented to the search they made. He testified that he had no choice.

Because of the view of the officers and petitioner Wright's view of the officers' right to search in this cause, the State insists credence is added to the arresting officers' testimony. It does not appear that there was a lack of

consent on the part of Wright but he consented because he thought as the officers making the arrest thought they were in position to make a search whether or not Wright consented. This Court in **Parker v. North Carolina,** 397 U.S. 790, and **McMann v. Richards,** 397 U.S. 759, recently held that a plea of guilty because it was the belief of the defendant his confession was admissible against him could not be set aside after judgment because defendant later learned that the confession was not admissible for some reason. The State insists that a similar rule should apply in this case.

In addition to the foregoing, from the record it appears that the officers did not introduce into evidence any property seized in the petitioner's home but from the trunk of his automobile parked in his driveway where they did find a price tag which was later identified by the owner of the store from which the television sets were stolen to be one which came from the television sets. The State takes the position that the search can be justified of the petitioner's automobile under the holding in **Chambers v. Maroney,** 399 U.S. 45, where it was held that automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a home without a warrant where there is probable cause to believe that the automobile has within it articles of property that the officers are entitled to seize.

CONCLUSION

In view of all of the foregoing, the State insists that the record does not indicate that the petitioners were prejudiced because of being tried jointly with a number of accomplices involved in the offense. If they had been tried separately from Dean Smith, who testified for the State, he, no doubt, would have been called as a State's witness and would have given the same testimony against the pe-

titioners that he gave in their joint trial. Of course, surprise is claimed by counsel for the petitioners, but it would appear that since Smith was younger and inexperienced and was guided into the criminal offense by one of the petitioners older than he, they should have at least suspected that he might testify for the State.

The other two questions raised by counsel for the petitioners likewise do not indicate they were unfairly tried. The State insists that they were not.

Respectfully submitted

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Certificate of Service

I, Thomas E. Fox, Deputy Attorney General, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of September, 1971, I served copies of the foregoing Reply to Petition for Writ of Certiorari on Gordon F. Ragland and James A. Wright, Jr., petitioners, by mailing copies in duly addressed envelopes, postage duly paid, to counsel of record, namely, James S. Patrick, Jr., Esq., Attorney at Law, 202 Public Square, Nashville Tennessee 37201.

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